IN THE

# Supreme Court of the United States

October Term, 1971.

## No. 71-1079.

EVELYN WILLIAMS HAY,

*Petitioner,*

*v.*

FRANK F. TRUSCOTT, DWIGHT L. MORRIS and OTIS W. ERISMAN, TRUSTEES OF THE ESTATE OF HARRY D. HOLLOWAY, DECEASED,

*Respondent.*

EVELYN WILLIAMS HAY,

*Petitioner,*

*v.*

PROVIDENT NATIONAL BANK (Formerly Land Title Bank and Trust Company), Substituted Trustee,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

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EVELYN WILLIAMS HAY,

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*v.*

PROVIDENT NATIONAL BANK (FORMERLY LAND TITLE BANK AND TRUST COMPANY) SUBSTITUTED TRUSTEE,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

The petitioner, Evelyn Williams Hay, respectfully prays that a Writ of Certiorari issue to review the judgments of the Supreme Court of the Commonwealth of Pennsylvania, entered in this case on November 22, 1971.

## OPINION BELOW.

The Definitive Decrees and Opinions Sur Exceptions to Adjudications of the Court of Common Pleas, Orphans' Court Division, of Philadelphia, Nos. 776 and 3708 of 1940 reported at 50 D. & C. 2d 667 (1970), and 50 D. & C. 2d 478 (1970), appear in the Appendix hereto.

## JURISDICTION.

An Order of the Pennsylvania Supreme Court was made and entered on October 13, 1971, and is appended hereto. A Petition for Reargument was filed and was denied by a Per Curiam Order filed November 22, 1971, and is also appended hereto. This Court's jurisdiction is invoked under 28 U. S. C. Sec. 1257(3).

## QUESTION PRESENTED.

Did the Courts of the Commonwealth of Pennsylvania take property without due process of the law from a person validly adopted in the State of California when they interpreted a Trust instrument and Will to exclude adopted persons from a class gift to children?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Pennsylvania Wills Act of 1947, 20 P. S. § 180 et seq.

Pennsylvania Wills Act of 1917, 20 P. S. § 181 et seq.

Pennsylvania Estates Act of 1947, 20 P. S. § 301.14(3).

United States Constitution, Amendment XIV.

## STATEMENT OF THE CASE.

Petitioner, Evelyn Williams Hay, is a claimant under Will and Deed of Trust of Harry D. Holloway, Deceased, by virtue of her being the adopted daughter of William Evans Holloway, a son of the decedent, a life tenant under the Trust provisions of the Will and Deed of Trust.

The decedent, HARRY D. HOLLOWAY, died March 15, 1939, leaving a Will dated June 25, 1938.

In Item 8 of the Will he gave his Trustees 4,000 shares of Common Stock of the Girard Investment Company, to pay the income to his son, William Evans Holloway, during his life, and

> "Upon the death of my said son, William Evans Holloway, leaving living issue, I direct that the said net income shall be paid to said child or children equally, share and share alike, until they shall respectively attain the age of twenty-one years, at which time I direct the corpus of the said Trust Fund shall pass to and vest in said child or children equally, share and share alike. In the event my son dies without leaving issue, I direct that the corpus of the Trust Fund hereinbefore provided for, shall fall into and become part of my residuary estate."

In Item 14 he gave his residuary estate to his Trustees to pay the income to his nieces, Salome Holloway and Grace Nix and his cousin, Leona Halliday, and to the survivor to distribute the principal "to any child of children that Grace Nix may leave surviving her. . . . In the event that Grace Nix dies without children . . . then . . . to such institution or institutions as my said Trustees shall direct. . . . ."

In addition to his will, HARRY D. HOLLOWAY, by Indenture made July 10, 1935 created a trust for his son, William Evans Holloway. The son received a life estate with the remainder to go to his children upon the following language:

"To pay over the net income from the trust unto William Evans Holloway, son of Settlor, for and during the full term of his life, and upon his death to transfer, assign and pay over the principal of the trust unto such of the children and issue of deceased children of Settlor's said son as shall be living at the death of Settlor's said son, equally, per stirpes, absolutely. In default of such issue, then living, of Settlor's said son to transfer, assign and pay over the said principal unto Settlor's niece, Salome Holloway, or, if she is not then living unto Grace Nix, daughter of Settlor's deceased sister, Grace Edy, absolutely."

William Evans Holloway died on December 3, 1968 in California. He was survived by his wife, Adrienne Gully Holloway and by their adult daughter, Evelyn Williams Hay, who was adopted by decedent's son, William Evans Holloway, and daughter-in-law, Adrienne, on November 4, 1968, in the State of California, where they resided.

The accountants filed their accounts to raise the question whether Evelyn Williams Hay (Petitioner), was a remainderman, i.e., the child of the life tenant, under the Will and the Trust. On May 12, 1970, the learned auditing Judge (Klein, Adm. J.), held that she was not. Exceptions to the adjudications were filed on behalf of Petitioner and were denied. The Supreme Court of Pennsylvania on October 13, 1971, affirmed the Judgments of the Orphans' Court of Philadelphia, Pennsylvania without rendering any Opinion. A Petition for Reargument was filed and denied by a Per Curiam Order filed November 22, 1971.

It was the lower Court's position that the Will "disclosed no intent, express or implied, that the testator contemplated either the inclusion in or the exclusion from the word "children" of adopted children. The will is completely silent on this point" (Page A6 of Adjudication).

At the time of the adoption, the adoptee (petitioner) was 66 years of age and the lower Court held that they were without authority to challenge the decree of the California Court and stated that they must give full faith and credit to the California Adoption Decree. However, the Court did question the judgment and common sense of the California Adoption Decree. The lower Court further held that, at common law adopted children had no right of inheritance from their adoptive parents, in *Cave's Estate*, 326 Pa. 358 (1937); that prior to the passage of the Pennsylvania Wills Act of 1917, adopted persons could not participate when testamentary gifts were made to children or issue; that the Pennsylvania legislature in Section 16(b) of the 1917 Wills Act provided for the inclusion of adopted children of other than the testator, if they were adopted prior to the Will. The Wills Act of 1947, which is the law presently in effect in Pennsylvania, changed this rule by providing that persons may take if adopted before the death of the testator. The lower Court continued that the instant case was subject, however, to the provisions of the 1917 Wills Act in that the testator died in 1939, leaving a Will executed in 1938, citing *Holton's Estate*, 399 Pa. 241, 159 A. 2d 883 (1960).

It was the petitioner's position in the lower Court and on appeal that the Pennsylvania rule of law with respect to inheritance rights of adopted children, should be abandoned because it is founded upon error and is inconsistent with public policy and social requirements. The Constitutional question raised by this petition was raised before the Supreme Court of Pennsylvania.

## REASONS FOR GRANTING THE WRIT.

**The Decision Below in Interpreting a Will and Trust Instrument to Exclude Adopted Persons From a Class Gift to Children Is the Taking of Property Without Due Process of Law Under the Provisions of the 14th Amendment to the United States Constitution.**

Although the Courts of Pennsylvania have denied the adoptee in the instant case, the inheritance under the Will and the taking under the trust on the ground that adopted persons cannot take in a class gift to children, this is in full variance with the law of adoption in Pennsylvania. 1 P. S. Section 1 et seq., Act of 1925, April 4, P. L. 127, Section 1; 1929, April 26, P. L. 822, Section 1; 1941, June 5, P. L. 93, No. 46, Section 1; 1941, July 2, P. L. 229, Section 1; 1947, June 30, P. L. 1180, Section 1; 1953, Aug. 26, P. L. 1411, Section 1; 1959, Dec. 21, P. L. 1955, Section 1 et seq. The law is that a valid adoption severs the adoptee from its natural family tree and engrafts it onto the family tree of the new parentage. *Schwab Adoption Case*, 355 Pa. 534, 536, 50 A. 2d 504, 505 (1947). The adoptee, in effect, loses the right to inherit because the Decree terminates forever all relationships between the child and its natural parents, severing it entirely from the natural family tree. *Adoption of Harvey*, 375 Pa. 1, 49 A. 2d 276 (1953); *In Re Adoption of Best*, 196 A. 2d 342, 413 Pa. 253 (1964). Thus there is the loss of a property right which by law is replaced only by the adoptee acquiring a new family tree, and it is respectfully submitted that the deprivation of this property right in the instant case is a denial of due process under the 14th Amendment of the United States Constitution.

In Pennsylvania, the legislature in Section 16(b) of the 1917 Wills Act, provided for the inclusion of adopted chil-

dren other than the testator, if *they were adopted prior to the date of the Will;* the Wills Act of 1947, presently in effect, changed this Rule, providing that persons may take if *adopted before the death of the testator.*

The Pennsylvania Courts held that this case was subject to the 1917 Act, as the testator died in 1939, leaving this Will executed in 1938 and Deed of Trust dated 1935. Since petitioner was adopted after the date of the Will and Trust and after the death of the testator, the courts held she could not inherit at all.

It is clear that the petitioner is deprived of her right of inheritance under both the 1917 and 1947 Wills Acts and the Estates Act of 1947. The 1947 Wills Act provides that in order for an adoptee to take, the adoption must occur before the death of the testator; the Estates Act provides that the adoption has to take place before the effective date of the conveyance. It is submitted, therefore, that under the provisions of both the 1917 and 1947 Wills Acts and the Estates Act of 1947 and the Pennsylvania's Courts interpretation of them there is the deprivation of property rights: petitioner finds herself on no family tree. There is clearly a taking without due process.

It is basic that on the principle of fairness and equity every citizen has a right to judicial review of the constitutionality of legislation which it is alleged takes from him without compensation his property, and he has the further right to have that question determined before those rights are swept from him. *Pennsylvania R. Co. v. Driscoll*, 339 Pa. 97, 198 A. 130 (1938). This Court has held that the guaranty of due process demands only that the law to be interpreted shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object to be sought by the legislation. *Paramount Pictures v. Langer*, D. C. N. D. 1938,

23 F. Supp. 890, motion granted 59 S. Ct. 641, 306 U. S. 619, 83 L. Ed. 1025. See, also, *Springfield Fire & Marine Ins. Co. v. Holmes*, D. C. Mont. 1940, 32 F. Supp. 964; *Publix Cleaners v. Florida Dry Cleaning and Laundry Board*, D. C. Fla. 1940, 32 F. Supp. 31; *Great Atlantic & Pacific Tea Co. v. Ervin*, D. C. Minn. 1938, 23 F. Supp. 70; *Daniel Loughran Co. v. Lord Baltimore Candy & Tobacco Co.*, 1940, 12 A. 2d 201, 178 Md. 38; *Stickley v. Givens*, 1940, 11 S. E. 2d 631, 176 Va. 548; *Washington Nat. Ins. Co. v. Board of Review of Unemployment Compensation Commission*, 1948, 61 A. 2d 178, 137 N. J. L. 596, *affirmed* 64 A. 2d 443, 1 N. J. 545.

## CONCLUSION.

For these reasons, a Writ of Certiorari should issue to review the constitutionality of the Pennsylvania Wills Acts of 1947 and 1917 and the Estates Act of 1947 as they discriminate against a legally adopted child.

Respectfully submitted,

S. REGEN GINSBURG,
*Counsel for Petitioner.*

*Of Counsel:*
LEON H. KLINE.

February 22, 1972

## CERTIFICATE OF SERVICE.

I hereby certify that on this 22nd day of February, 1972, five copies of the Petition for Writ of Certiorari were delivered to Otis W. Erisman, Truscott & Erisman, 2232 Land Title Building, Philadelphia, Pa. 19110 and Edward M. David, Saul, Ewing, Remick & Saul, 2301 Packard Building, Philadelphia, Pa. 19102, Attorneys for the Respondents. I further certify that all parties required to be served have been served.

S. REGEN GINSBURG,
*Counsel for Petitioner.*

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# Appendix.

## ADJUDICATION OF THE ORPHANS' COURT OF PHILADELPHIA DATED MAY 12, 1970.

ORPHANS' COURT DIVISION

COURT OF COMMON PLEAS OF PHILADELPHIA

No. 3708 of 1940

Estate of HARRY D. HOLLOWAY, DECEASED.

(#43 June '69)

(William Evans Holloway Trust)

Sur account entitled Sixth and Final Account of Frank F. Truscott, Dwight L. Morris and Otis W. Erisman, Trustees, as stated by, etc.

Before KLEIN, *Administrative Judge.*

This account was called for audit March 9, 1970.

Counsel appeared as follows:

OTIS W. ERISMAN, representing TRUSCOTT AND ERISMAN, for the Accountants.

EDWARD M. DAVID for Salome Holloway.

S. REGEN GINSBURG for Evelyn Williams Hay, Claimant.

The reason for the filing of the present account is the death of William Evans Holloway, life tenant, on December 3, 1968, whereupon, by the terms of the will of testator, this trust terminated. Letters Testamentary are stated to have been granted Adrienne G. Holloway by the Superior Court of the State of California for the County of Los Angeles.

The names of the remaindermen and all other necessary and relevant facts pertaining to the terms of the trust are set forth in the statement of proposed distribution.

All parties in interest are stated to have received notice of this audit. Proof of compliance with Rule 5, Section 5, of the Supreme Ct. O. C. Rules relating to notice to the Attorney General of the Commonwealth of Pennsylvania in cases involving charitable gifts, is annexed.

Harry D. Holloway died on March 15, 1939, leaving a will which was dated June 25, 1938. In Item 8 of his will, he created a trust for his son, William Evans Holloway, as follows:

> "ITEM 8. I have provided generously for my son, WILLIAM EVANS HOLLOWAY, during my lifetime, but I now give, devise and bequeath unto my Trustees hereinafter named, and their successors, Four Thousand (4,000) shares of the Common Stock of the Girard Investment Company, (which is the equivalent of $40,000.00), and the said corpus as so composed is to be retained as long as in the judgment of my trustees is proper and for the best interest of the trust herein created; IN TRUST, nevertheless, to invest, re-invest and keep invested (subject as hereinbefore and hereinafter provided) to collect the income therefrom arising and to pay the same to my son, WILLIAM EVANS HOLLOWAY, for and during the term of his natural life, . . .
>
> . . . . . .
>
> "Upon the death of my said son, William Evans Holloway, leaving living issue, I direct that the said net income shall be paid to said child or children equally, share and share alike, until they shall respectively attain the age of twenty-one years; at which time I direct the corpus of the said Trust Fund shall pass to and vest in said child or children equally, share and

share alike. In the event my son dies without leaving issue, I direct that the corpus of the Trust Fund hereinbefore provided for, shall fall into and become part of my residuary estate."

William Evans Holloway died on December 3, 1968, a resident of Los Angeles, California, at the age of seventy-eight years. He had been married three times. His first two marriages were dissolved by divorce. Two children, who died in his lifetime, were born of his first marriage. No children were born of his other two marriages. He was survived by his third wife, Adrienne Holloway.

On November 4, 1968, William and his wife Adrienne, who is now seventy-nine years of age, adopted Evelyn Williams Hay in the Superior Court of the State of California for the County of Los Angeles. At the time of the adoption, William was in his terminal illness with cancer of the liver, which prevented him from appearing in court. He died less than a month later. Evelyn, the adopted child, is sixty-seven years of age, married and the mother of two children who are in their forties.

Evelyn Williams Hay, the adopted child, now claims the corpus of the trust. Her claim is vigorously resisted by the trustees and the residuary beneficiaries, who maintain that her adoption does not qualify her to receive any benefits under the will and that the corpus falls into and becomes part of the residuary estate.

Although the adoption of a sixty-seven year old married woman, who is the mother of two grown children, by a dying man of seventy-nine is a strange and questionable phenomenon, we are without authority to challenge collaterally the decree of the California court and must give it full faith and credit, as the parties were all residents of that state at the time of the adoption proceedings. We may, however, question the judgment and common sense of the

court which sanctioned such a peculiar and unnatural adoption.

At common law adopted children had no right of inheritance from their adoptive parents. In Cave's Estate, 326 Pa. 358 (1937), Mr. Justice (later Chief Justice) Stern, said at p. 359:

> "The right of adopted children to inherit from kindred of their adoptive parents is dependent entirely upon statutory enactments, and because the 'call of the blood' is one of the most firmly rooted instincts of human nature, courts tend to a strict construction of such legislation. In the absence of a plain legislative mandate to the contrary a stranger to the adoption proceedings should not have his property diverted from its natural course of descent to the heirs of his blood; . . ."

A long line of cases clearly establishes that prior to the passage of the Wills Act of 1917, adopted children could not participate in the distribution of estates when testamentary gifts were made to children or issue: Schafer v. Eneu, 54 Pa. 304 (1867); Puterbaugh's Estate, 261 Pa. 235 (1918); Yate's Estate, 281 Pa. 178 (1924); Corr's Estate, 338 Pa. 337 (1940); Freeman's Estate (No. 1), 40 Pa. Superior Ct. 31 (1909).

The Legislature in Section 16(b) of the 1917 Wills Act, for the first time, provided for the inclusion of adopted children of other than the testator, if they were adopted prior to the date of the will. This section provides that:

> "Whenever in any will a bequest or devise shall be made to the child or children of any person other than the testator, without naming such child or children, such bequest or devise shall be construed to include any adopted child or children of such other person *who*

*were adopted before the date of the will*, unless a contrary intention shall appear by the will." (Underscoring supplied).

The Wills Act of 1947, which is the law presently in effect, changed this rule by providing that persons may take if adopted before the death of the testator. The present case, however, is subject to the provisions of the Wills Act of 1917 as the testator died in 1939, leaving a will executed in 1938. It is squarely controlled by Holton Estate, 399 Pa. 241 (1960), in which the testator died in 1931, leaving a will executed in 1929. He created a trust which provided for the payment of income to a son, Howard, for life and ". . . at his death and until the expiration of twenty-one years" therefrom, "to divide the net income . . . into as many parts . . . as there shall be children of [Howard] living at the quarterly distribution periods and children of [Howard] then dead represented by descendants then living . . . and to pay over to each child or descendants of a deceased child of [Howard] then found entitled it's shares of such income . . ." It further provided that upon the expiration of the twenty-one year period, the trust principal was to be divided "into as many parts . . . as there shall be children of [Howard] then alive and children of [Howard] then dead, represented by descendants then living, . . . and the shares thus ascertained to pay over to each child and descendants of a deceased child then found entitled, absolutely and in fee."

Howard adopted two children after the testator's death. The Supreme Court, in a scholarly opinion by Mr. Justice Benjamin R. Jones, reviewed in considerable detail the development of the law in this state relating to the rights of adopted children to inherit from the estates of persons other than their adoptive parents. The Court dis-

missed the claims of the adopted children and held: (1) the will disclosed "no intent, expressed or implied, that the testator contemplated either the inclusion in or the exclusion from the word 'children' of adopted children"; (2) under the common law of Pennsylvania an adopted child or children were not included within testamentary gifts or bequests to a "child" or "children"; (3) the Wills Act of 1917, P. L. 403, § 16(b), does not apply to an adopted child who was adopted after the execution of the will.

We have studied the will in the instant case most carefully and must conclude, as the Court did in Holton, that it disclosed no intent, expressed or implied, that the testator contemplated either the inclusion in or the exclusion from the word "children" of adopted children. The will is completely silent on this point.

Our courts, subsequent to Holton, have held that persons adopted after the date of a testator's death by persons other than the testator are not included in gifts to the children or issue of such adopting individuals: Fownes Trust, 421 Pa. 476 (1966); Pennington Trust, 421 Pa. 334 (1966); Tower Estate, 410 Pa. 389 (1963).

Collins Estate, 393 Pa. 195 (1958) appears to be at variance with the well established rule laid down by our courts. In that case, the testator died in 1921, leaving a will executed in 1912. The Court held that in the context of the Collins will, the word "descendants" was intended to include persons to whom property descended under the intestate laws and therefore included children who were adopted after the testator's death. Collins was distinguished and held to be inapplicable in Holton Estate, supra, by Mr. Justice Jones, who also wrote the opinion in Collins.

Mr. Ginsburg seeks to have us set aside the well-entrenched Pennsylvania rule of law with respect to the inheritance rights of adopted children. He relies in a large

measure upon the fact that the courts in a number of other jurisdictions appear to have modified their rulings to include adopted children when the beneficiaries are designated by language similar to that used by the testator in the present case. We, as a lower court, are duty bound to follow the decisions of the appellate courts of this Commonwealth, not those of other states.

Mr. Ginsburg also urges us to follow the dissenting opinion of Mr. Justice Roberts in Fownes Trust, supra, and to disregard the holding of the majority of the Court in that case. This we cannot do. We are bound by the decisions of the majority of our Supreme Court not the minority. If a rule of law enunciated by a majority of the justices of that Court is to be changed, it must be done by them, not by us.

The testator's intent is the polestar and must prevail: Burleigh Estate, 405 Pa. 373 (1961). When Harry D. Holloway, the testator, executed his will in 1938, and also when he died in 1939, the law in this State was crystal clear that if his son William adopted a child after his father's death, this child would not take under the language used by him in his will. To award his estate to this sixty-seven year old adopted child would be an obvious and unwarranted subversion of the testator's clearly expressed intention.

Subsequent to the audit in the present case, our attention was directed to Chambers' Estate, 438 Pa. 22, filed on March 25, 1970, in which our Supreme Court, in a four to three decision, held that a gift to the "children" of the daughter of a testator who died in 1933, leaving a will executed in 1930, included William McGill, a child adopted by the daughter when he was two years of age, several years after her father's death.

We have studied this opinion carefully and have concluded that it is inapposite. The conclusion of the majority

of the Court was based largely on the fact that testator's daughter had adopted Paul, a recently born infant, in 1929, more than a year before the will was executed. This child died in September of 1931, while testator was still alive, at the age of two years and four months. The Court found that when the will was written the testator knew that his daughter could not bear children and that she had previously adopted an infant child. Mr. Justice Jones, in the majority opinion, discussed testator's use of the word "children" in his will and said:

> ". . . Because of the factual situation in 1930, when the will was written, the only natural interpretation that could conceivably be given this bequest is that the testator intended to provide for his adopted grandson, Paul McGill, and for any other children adopted by Hazel [testator's daughter] in the future. Any other explanation would not only be absurd under the facts of this case, but would render the bequest nugatory. A testator is presumed not to have included mere surplusage in his will. *Benedum Estate*, 427 Pa. 408, 415-16, 235 A. 2d 129, 133 (1967). By his use of the plural noun, "children," the testator evidenced an intent to include in his bequest any child or children which Hazel might have in addition to the one child, Paul, who had already been adopted. Since the testator knew that Hazel could *only* have additional children by adoption, he *must* have intended to provide for these children. The provisions for Hazel's "children" makes utterly no sense unless it was intended to include after-adopted children."

The opinion concluded with the statement that:

> ". . . All these facts make it clear that the testator in the instant case was a concerned and devoted father

and grandfather who wished to provide for Hazel's children, regardless of any *legal* distinctions drawn between relationship by adoption and relationship by blood. . . ."

There is a vast difference in the factual situation existing in Chambers and that which we find in the present case. William Evans Holloway, the testator's son, was clearly capable of begetting children, as he was the father of twin children, who predeceased him, by his first wife, Regina. In Chambers, the Claimant was a child of tender years when he was adopted by decedent's daughter in 1937. She raised him and lived for almost thirty years after the adoption. In our case the claimant is a woman who was over sixty-six years of age when she was adopted by William less than a month before he died.

We repeat that we are of the opinion that the instant case is clearly controlled by Holton Estate, supra. We are confirmed in this belief by the clear distinction drawn by Mr. Justice Jones between Chambers and Holton in the following language found in his majority opinion:

". . . However, we made it perfectly clear in that case [Holton] that a prerequisite to the application of the quoted rule is the *absence* of any indication of what was the testator's *actual* intent. In *Holton Estate*, we found *no* such indication on the following facts: the will provided for the testator's son, Howard, and for Howard's children; Howard's wife, not Howard, was incapable of having children; and, no children were adopted by Howard until almost four years *after* the testator's death. On those facts, it would be equally plausible to either find that the testator did or that he did not intend to include adopted children in his will. Accordingly, we were forced to resort to the legislative rule of construction in the Act of 1917."

Likewise, in our case, the will provides for testator's son, William, and for William's children. William was capable of having children; no child was adopted until less than a month before he died and almost thirty years after testator died; and there is nothing in the will to permit a finding that testator intended to include adopted children.

The claim of Evelyn Williams Hay as a remainderman will therefore be dismissed and the balance of principal and interest in this trust will be awarded to the trustees of the residuary trust.

Frank F. Truscott, one of the trustees and accountants, died on December 5, 1969, and Letters of Administration were granted to Otis W. Erisman and The First Pennsylvania Banking and Trust Company. We are informed that an account has been filed for the Residuary Trust, of which Mr. Truscott was also a trustee, and that at the audit of that account the Court will be asked to appoint a substituted trustee for him.

A claim was made at the audit by Edward M. David, Esq. for services rendered by him in these proceedings. Consideration of the allowance of this request and the amount thereof will await the ultimate disposition of this litigation.

The fund presently accounted for was awarded to the accountants by adjudication of Bolger, J., dated March 5, 1968. The account shows a balance of principal of

| | |
|---|---|
| | $177,057.73 |
| and a balance of income of | 19,581.06 |
| making a total of | $196,638.79 |

from which there is awarded to Arienne G. Holloway, executrix of the estate of William Evans Holloway, all income accrued to December 3, 1968, and the balance, together with

any further income to time of actual distribution, is awarded to Dwight L. Morris and Otis W. Erisman, trustees of the Residuary Trust, for the uses and purposes stated in the will.

All awards are subject to such distributions as have heretofore been properly made.

Leave is granted to the accountants to make all transfers necessary to effect distribution in accordance with this adjudication.

A schedule of distribution, duly certified by counsel to be correct and in conformity with this adjudication, and, if distribution is to be made in kind, approved by all parties in interest, shall within ninety (90) days after the absolute confirmation of this account be submitted to the auditing judge. The schedule, when approved and annexed hereto, will form part hereof.

The certificate of the official examiner as to the awards in trust will be produced to the auditing judge in accordance with the Rule of Court.

And Now, May 12, 1970, the account is confirmed NISI.

Klein
*Administrative Judge*

## ADJUDICATION OF THE ORPHANS' COURT OF PHILADELPHIA DATED MAY 12, 1970.

ORPHANS' COURT DIVISION
COURT OF COMMON PLEAS OF PHILADELPHIA

No. 776 of 1940.

IN RE TRUST ESTATE OF
HARRY D. HOLLOWAY, SETTLOR.

(#41 June '69.)

(DEED OF TRUST DATED JULY 10, 1935.)

Sur account entitled First and Final Account of Provident National Bank (formerly Land Title Bank and Trust Company), Substituted Trustee.

Before KLEIN; Administrative Judge

This account was called for audit March 9, 1970.

Counsel appeared as follows:

OTIS W. ERISMAN, representing TRUSCOTT AND ERISMAN, for the Accountant.

EDWARD M. DAVID for Salome Holloway.

S. REGEN GINSBURG for Evelyn Williams Hay, Claimant.

The reason for the filing of the present account is the death of William Evans Holloway, life tenant, on December 3, 1968, whereupon, under the terms of the deed of trust this trust terminated. Letters Testamentary are stated to have been granted Adrienne G. Holloway by the Superior Court of the State of California for the County of Los Angeles.

All parties in interest are stated to have received notice of this audit.

By indenture dated July 10, 1935, Harry D. Holloway created an irrevocable trust, in which he directed the trustee:

> "To pay over the net income from the trust unto William Evans Holloway, son of Settlor, for and during the full term of his life, and upon his death to transfer, assign and pay over the principal of the trust unto such of the children and issue of deceased children of Settlor's said son as shall be living at the death of Settlor's said son, equally, per stirpes, absolutely. In default of such issue, then living, of Settlor's said son to transfer, assign and pay over the said principal unto Settlor's niece, Salome Holloway, or if she is not then living unto Grace Nix, daughter of Settlor's deceased sister, Grace Edy, absolutely."

The following question has been raised by the accountant in the statement of proposed distribution for determination by the Court:

> "William Evans Holloway died on December 3, 1968 leaving no issue of his body. William Evans Holloway was seventy-eight years of age at the time of his death, having been born on December 22, 1889. On November 4, 1968, or less than one month before he died from cancer of the liver, and when he was too ill to appear in Court, he and his wife, Adrienne Gully Holloway, purportedly adopted Evelyn Williams Hay who was then sixty-six years of age. Said Evelyn William Hay was not related by blood to either William Evans Holloway or Adrienne Gully Holloway. At the time of the purported adoption, said Evelyn Williams

Hay was married. The Accountant raises for determination of the auditing judge the question whether the purported adoption of Evelyn Williams Hay by William Evans Holloway and his wife, Adrienne Gully Holloway, is valid and whether, assuming arguendo the validity of the adoption, Evelyn Williams Hay qualifies as a remainderman of the trust, i.e. whether she is a 'child' of William Evans Holloway."

This case is controlled by Holton Estate, 399 Pa. 241 (1960), as well as by our adjudication filed this day in the accounting of the trust created under Item 8 of settlor's will No. 3708 of 1940. We incorporate herein what we said in that adjudication concerning the claim of Evelyn Williams Hay, which claim we do hereby dismiss.

The fund presently accounted for was awarded to the accountant by the adjudication of Bolger, J., dated October 30, 1941. A waiver of accounting to February 19, 1968 by the personal representative of the life tenant's estate has been filed and is annexed.

The account shows a balance of principal of $38,049.90

and a balance of income of 3,263.00

making a total of $41,312.90

from which the income accrued to December 3, 1968 is awarded to Adrienne G. Holloway, executrix of the estate of William E. Holloway, and the balance, together with any further income to time of actual distribution, is awarded to Salome Holloway.

Accountant has requested terminal trustee's compensation of 5 per cent, based on the current value of 3,915 shares of Girard Investment Company 6 per cent preferred stock,

when determined. There was no objection to this request and it will be allowed as a charge against the residuary estate.

All awards are subject to such distributions as have heretofore been properly made.

Leave is granted to the accountant to make all transfers necessary to effect distribution in accordance with this adjudication.

## OPINION OF THE ORPHANS' COURT OF PHILADELPHIA DATED OCTOBER 28, 1970.

ORPHANS' COURT DIVISION.
COURT OF COMMON PLEAS OF PHILADELPHIA.

No. 776 OF 1940.

In re Trust estate of
HARRY D. HOLLOWAY,
*Settlor.*

Before: KLEIN, A. J., BOLGER, LEFEVER, SAYLOR, SHOYER and SILVERSTEIN, *J. J.*

### Opinion.

PER CURIAM.

Evelyn Williams Hay as an adopted child of William Evans Holloway, life tenant of the trust created by his father in 1935, has filed exceptions to the adjudication on the trustee's account whereby principal was awarded to Salome Holloway, niece of the settlor, who was named as the remainderman in default of issue of the life tenant.

Mrs. Hay was married and was sixty-six years of age when on November 4, 1968, the life tenant and his wife adopted her. On December 3, 1968, the life tenant died at the age of seventy-eight years. Mrs. Hay was not related by blood to either the life tenant or his wife.

The deed of trust was executed by the settlor thirty-three years before the adoption of the claimant and the

settlor died on March 15, 1939, which was twenty-nine years before the adoption. The life tenant, William Evans Holloway, died December 3, 1968, survived by no natural child and no adopted child other than the claimant.

Prior to the passage of the Wills Act of June 7, 1917, P. L. 403, it was the established rule in Pennsylvania that adopted children could not participate in testamentary gifts to "children". There was no statute governing the rights of adopted children in inter vivos conveyances until the Estates Act of 1947, P. L. 100, 20 P. S. § 301.1 which provides in Section 14(3) that in the absence of a contrary intent in a deed or trust only a person adopted before the effective date of the conveyance shall be considered the child of his adopting parent or parents and not the child of his natural parents.

The claimant does not qualify under the terms of the Estates Act of 1947 as she was not adopted by the life tenant prior to the execution of the deed. The Learned Auditing Judge was correct in his conclusions as set forth in his adjudication and properly awarded the corpus of his estate to Salome Holloway under the terms of the deed as the gift to her was conditioned on his death without issue. The life tenant left no issue of the body and there was no qualified adopted child surviving him.

Accordingly, the exceptions are dismissed and the adjudication is confirmed absolutely.

October 28, 1970. SAYLOR, *J.*

# OPINION OF THE ORPHANS' COURT OF PHILADELPHIA DATED OCTOBER 28, 1970.

ORPHANS' COURT DIVISION

Court of Common Pleas of Philadelphia

No. 3708 of 1940.

Estate of

HARRY D. HOLLOWAY,

(William Evans Holloway Trust)

*Deceased.*

Before: Klein, A. J., Bolger, Lefever, Saylor, Snyder and Silverstein, *J. J.*

**Opinion.**

Evelyn Williams Hay as an adopted child of William Evans Holloway, life tenant of the trust created in Item 8 of the will of Harry D. Holloway, has filed exceptions to the adjudication on the trustee's account whereby principal was awarded to the trustees of the residuary trust because of the failure of issue surviving the life tenant upon his death on December 3, 1968, at the age of seventy-eight years. The claimant was married and was sixty-six years of age when, by decree of a California Court she was adopted by the life tenant and his wife on November 4, 1968.

The testator's will was executed on June 25, 1958. Therefore the claimant was adopted thirty years after such

execution and twenty-nine years after the date of the testator's death which occurred on March 15, 1939.

In *Item* 8 of his will the testator named as remaindermen of the trust established for his son, William Evans Holloway, his living issue and provided that in the event his son died without leaving issue the corpus of the trust was to become part of the residuary trust. As the claimant is not issue or a natural child of the life tenant she must qualify as a child by virtue of her adoption by him if she is to take the remainder of the trust.

Prior to the passage of the Wills Act of 1917 it was the established rule in Pennsylvania that adopted children could not participate in testamentary gifts to children. The Wills Act of June 7, 1917, P. L. 403, which was in effect at the time of the testator's death, provided in Section 16(b) that an adopted child of someone other than the testator may inherit if, and only if, such child was adopted before the date of the will "unless a contrary intention shall appear by the will". There was no language in the will showing that the testator had a contrary intention. Under the very terms of this act, therefore, the claimant does not qualify as a "child", let alone as "issue".

Section 14(6) of the Wills Act of 1947, even if applicable, does not make the claimant eligible as an adopted child although it alters the law by providing that an adoptee is qualified if the adoption preceded the death of the testator and not merely the execution of the will. The legislature in imposing the new qualification did so to avoid the possibility of adoptions made for the sole purpose of preventing a gift over in default of issue.

Under the facts, the statutes and the decisions of the courts the claimant does not qualify as issue or as a child of the deceased life tenant. The Learned Auditing Judge fully considered the decisions apposite to the facts in this case

and correctly applied the law of this state on the subject. He properly refused, as suggested by the exceptant, to apply the law of another state or to follow the alleged trend of the times to broaden the inheritance right of adoptees.

The award of the principal to the trustees of the residuary trust was made in accordance with the law of Pennsylvania.

The exceptions are dismissed and the adjudication is confirmed absolutely.

SAYLOR, *J.*

October 28, 1970.

## OPINION OF THE ORPHANS' COURT OF PHILADELPHIA DATED OCTOBER 28, 1970.

ORPHANS' COURT DIVISION

COURT OF COMMON PLEAS OF PHILADELPHIA

No. 3708 of 1940.

Estate of

HARRY D. HOLLOWAY,

*Deceased.*

Before: KLEIN, A. J., BOLGER, LEFEVER, SAYLOR, SHOYER and SILVERSTEIN, *J. J.*

PER CURIAM.

At the bar of the court upon argument the attorney for Evelyn Williams Hay stated that the exceptions filed by him in her behalf were withdrawn with respect to the award of the court under *Item 9* of the decedent's will.

The adjudication of the Learned Auditing Judge dated May 12, 1970, relating to Item 9 is confirmed absolutely.

SAYLOR, *J.*

October 28, 1970.

# OPINION OF THE SUPREME COURT OF PENNSYLVANIA DATED OCTOBER 13, 1971.

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT.

Nos. 188, 189, JANUARY TERM, 1971.

TRUST OF HARRY D. HOLLOWAY

APPEAL OF EVELYN WILLIAMS HAY

ESTATE OF HARRY D. HOLLOWAY,

*Deceased.*

APPEAL OF EVELYN WILLIAMS HAY

APPEAL FROM DECREES OF COURT OF COMMON PLEAS ORPHANS' COURT DIVISION, OF PHILADELPHIA, NOS. 776 AND 3708 OF 1940.

ENTERED; OCTOBER 28, 1970.

## Opinion.

FILED: October 13, 1971

PER CURIAM

Decrees affirmed. Appellant pay costs.

## ORDER OF SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT, DENYING PETITION FOR REARGUMENT.

11/22/71. Petition denied.

/s/ Per Curiam.

MAR 15 1972
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1971.

## No. 71-1079.

EVELYN WILLIAMS HAY,

*Petitioner,*

*v.*

FRANK F. TRUSCOTT, DWIGHT L. MORRIS and OTIS W. ERISMAN, Trustees of the Estate of HARRY D. HOLLOWAY, Deceased,

*Respondents.*

EVELYN WILLIAMS HAY,

*Petitioner,*

*v.*

SALOME HOLLOWAY,

*Respondent.*

**On Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania.**

## BRIEF FOR RESPONDENTS IN OPPOSITION.

*Of Counsel:*
TRUSCOTT AND ERISMAN,
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Philadelphia, Pennsylvania. 19110

OTIS W. ERISMAN,
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*Of Counsel:*
SAUL, EWING, REMICK AND SAUL,
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*Attorney for Salome Holloway, Respondent.*

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## CITATIONS

**Cases:**

Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U. S. 308 (1968)

Apex Smelting Co. v. Burns, 230 U. S. 60 (1913)

Appeal of Allegheny County Airport Authority, 411 Pa. 281, 191 A. 2d 851 (1963)

Appeal of Middleton Township, 419 Pa. 583, 215 A. 2d 687 (1965)

Bailey v. Anderson, 326 U. S. 203 (1945)

Beal v. Washington, 356 U. S. 544 (1958)

Bowe v. Scott, 233 U. S. 658 (1914)

Brown et al. Appellants, v. Glenside Lumber & Coal Co., 422 Pa. 481, 220 A. 2d 822 (1966)

Capital City Dairy Co. v. Ohio, 183 U. S. 238 (1901)

Cardinale v. Louisiana, 394 U. S. 437 (1969)

Central Union Co. v. Edwardsville, 269 U. S. 190 (1925)

Cockburn Co. v. Estopinal, 251 U. S. 170 (1919)

Harding v. Illinois, 196 U. S. 78 (1904)

Herndon v. Georgia, 295 U. S. 441 (1935)

Hissel v. McClintock, 257 U. S. 611 (1915)

Hudson v. Chicago, 202 U. S. 275 (1906)

Irving Trust Co. v. Day, 314 U. S. 556 (1942)

Labrite v. Vincent, 401 U. S. 532 (1971)

Mager v. Grima, 8 How. 490 (1850)

Michel v. Louisiana, 350 U. S. 91 (1955)

Mutual Life Ins. Co. v. McGrew, 188 U. S. 291 (1902)

Parker v. Illinois, 333 U. S. 571 (1947)

Pennsylvania R. Co. v. Illinois Brick Co., 297 U. S. 447 (1935)

U. S. v. Burnison, 339 U. S. 87 (1950)

Williams v. Georgia, 349 U. S. 375 (1954)

Yeadon Wood Civic Association, Appellant, v. Lower Merion Township Board of Adjustment, 406 Pa. 413, 179 A. 2d 49 (1962)

**Statutes:**

62 Stat. 929, 28 U. S. C. Section 1257

Pennsylvania Wills Act of 1947, 20 P. S. Section 180.14(a)

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1971.

No. 71-1079.

EVELYN WILLIAMS HAY,

*Petitioner,*

*v.*

FRANK E. TRUSCOTT, DWIGHT L. MORRIS AND OTIS W. ERISMAN, TRUSTEES OF THE ESTATE OF HARRY D. HOLLOWAY, DECEASED,

*Respondents.*

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EVELYN WILLIAMS HAY,

*Petitioner,*

*v.*

SALOME HOLLOWAY,

*Respondent.*

---

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

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## BRIEF FOR RESPONDENTS IN OPPOSITION.

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### OPINIONS BELOW.

This information is adequately set forth in the Petition with the exception that Petitioner erroneously cites a case, 50 D. & C. 2d 478, which is not here involved. This case is also erroneously included in the Petitioner's Appendix at A21.

## JURISDICTION.

Respondents contend that this Court lacks jurisdiction because of Petitioner's failure to raise the alleged constitutional question properly in the Courts of the Commonwealth of Pennsylvania. This contention will be fully discussed in the Statement and the Argument, *infra*.

## QUESTIONS PRESENTED.

(a) Whether this Court lacks jurisdiction because Petitioner failed to raise the alleged constitutional question properly in the Courts of the Commonwealth of Pennsylvania.

(b) Whether the Courts of the Commonwealth of Pennsylvania have violated any constitutional rights of the Petitioner where, in interpreting the trust instrument and the will of a third person under the applicable Pennsylvania statutes and case law, they excluded Petitioner from a class gift to children of the testator-settlor's son where Petitioner had been adopted by testator-settlor's son over twenty-nine years after the death of the testator-settlor, when Petitioner was sixty-six years of age and he was seventy-eight years of age and bedridden with cancer from which he died less than one month later.

## STATUTES INVOLVED.

The statutes involved and the Amendment of the United States Constitution which Petitioner alleges is involved are set forth in the Petition at page 2.

## STATEMENT

In 1935, Harry D. Holloway created an irrevocable Deed of Trust for the benefit of his son, William Evans Holloway. Harry D. Holloway died in 1939 leaving a will which also created a trust for his son. Both trusts provided that upon the death of William Evans Holloway the remainder would pass to his children, with gifts over in default of issue. On November 4, 1968, Williams Evans Holloway, son of testator-settlor, and his wife adopted Evelyn Williams Hay (R. 30a-31a). At that time William Evans Holloway was seventy-eight years of age (R. 22a). He knew at that time that he had terminal cancer of the liver (R. 56a) which prevented his appearance in Court (R. 30a) and from which he died less than one month later (R. 55a, 56a). Evelyn Williams Hay, the adopted "child" and Petitioner herein, was sixty-six years of age, was married, elected not to change her name (R. 22a, 23a) and was the mother of two children (R. 54a). William Evans Holloway, testator's son, died December 3, 1968 (R. 35a, 55a) survived by no other natural or adopted issue.

Evelyn Williams Hay claimed the remainder as the child of William Evans Holloway. The Pennsylvania Courts held that under Pennsylvania statutes and case law she was not entitled to take as a child under the will or deed of a third person, who died over twenty-nine years before the adoption took place. The Pennsylvania Courts awarded the remainder of the testamentary trust to the Trustees of the Residuary Trust under the Will of Harry D. Holloway and the remainder of the Inter Vivos Deed of Trust to Salome Holloway. It is to be noted that Petitioner has named as Respondent, Provident National Bank (formerly Land Title Bank and Trust Company), Substituted Trustee. The Trustee is merely a stakeholder and has no interest in this litigation. The proper Respondent in the Inter Vivos

Deed of Trust is Salome Holloway for whom an appearance has been entered in this Court.

The opinions of the Auditing Judge of the Orphans' Court Division of the Court of Common Pleas of Philadelphia County set forth in Petitioner's Appendix (A1-A15) contain no reference to any constitutional question nor do the opinions of the Orphans' Court Division en banc (Petitioner's Appendix A16-A20), confirming absolutely the Auditing Judge's adjudications. In fact, the record in the lower court is bare of any mention of any constitutional question by Petitioner or her counsel.

The Supreme Court of Pennsylvania by order dated October 13, 1971 merely affirmed, without opinion, the decrees of the lower court, *per curiam* (Petitioner's Appendix A22). Likewise, without opinion, the Supreme Court of Pennsylvania denied by a *per curiam* order entered on November 22, 1971 the Petition for Reargument (Petitioner's Appendix A23).

## ARGUMENT.

### I.

### This Court Lacks Jurisdiction Because of Petitioner's Failure to Raise the Alleged Constitutional Question Properly in the Courts of the Commonwealth of Pennsylvania.

Sub-section 3 of 62 Stat. 929, 28 U. S. C. Section 1257 requires that the "alleged constitutional issue" must be "drawn in question." The proper method of raising the constitutional question is dependent upon the particular state practice, at least as long as the litigant has a reasonable opportunity to have such an issue heard and determined. *See Central Union Co. v. Edwardsville*, 269 U. S. 190, 194-5 (1925); *Pennsylvania R. Co. v. Illinois Brick Co.*, 297 U. S. 447, 462-3 (1935); *Parker v. Illinois*, 333 U. S. 571, 574-5 (1947); *Michel v. Louisiana*, 350 U. S. 91, 93 (1955). The constitutional question must be raised at the proper point in the state court proceeding. *Gobelman Co. v. Estoppial*, 251 U. S. 179, 181 (1919); *Beck v. Washington*, 369 U. S. 541, 550 (1962). The rule that in cases coming from state courts this Court may review only those issues which were presented to the state court is not discretionary but jurisdictional. *See Cardinale v. Louisiana*, 394 U. S. 437, 439 (1969); *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U. S. 308, 334 (dissent) (1968). "A state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power." *Williams v. Georgia*, 349 U. S. 375, 382-3 (1954). *See Hulbert v. Chicago*, 202 U. S. 275 (1905) where there was, as here, complete failure to raise the federal constitutional question at the trial court level.

This Court will decline to exercise jurisdiction where the highest state court is completely silent on the federal question assuming, unless it can affirmatively be shown otherwise, that the silence is due to the procedural deficiency. *Bailey v. Anderson*, 326 U. S. 203, 206-7 (1945); *Mutual Life Ins. Co. v. McGrew*, 188 U. S. 291, 309-(1902).

The law of Pennsylvania is clear that a question not raised properly in the court below will not be considered by the Supreme Court of Pennsylvania on appeal and this rule applies even though the question sought to be raised involves a constitutional issue. *Wynnewood Civic Association, Appellant v. Lower Merion Township Board of Adjustment*, 406 Pa. 413, 419, 179 A. 2d 649, 652 (1962); *Amalgamated Transit Union, Division 85 v. Port Authority of Allegheny County, Appellant*, 417 Pa. 299, 307; 208 A. 2d 271, 275 (1965); *Brown et al., Appellant v. Glenside Lumber & Coal Co.*, 429 Pa. 601, 603; 240 A. 2d 822, 825 (1968); *Archbishop O'Hara's Appeal*, 389 Pa. 35, 46-47; 131 A. 2d 587, 593-593 (1957).

Rule 23, Section 1(f). of the United States Supreme Court rules provides as follows:

> "1. The petition for writ of certiorari shall contain in the order here indicated— * * * *
>
> (f) If review of the judgment of a state court is sought, the statement of the case shall also specify the state in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary

> thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

Petitioner's unsuccessful attempt to meet the above requirements is limited to the following at page 5 of her Petition:

> "It was the petitioner's position in the lower Court and on appeal that the Pennsylvania rule of law with respect to inheritance rights of adopted children, should be abandoned because it is founded upon error and is inconsistent with public policy and social requirements. The Constitutional question raised by this petition was raised before the Supreme Court of Pennsylvania."

Petitioner's vagueness is understandable because of her complete failure to meet the requirements of Pennsylvania state practice that a federal constitutional question must be raised in the trial court. The Petition is fatally defective on its face because, in effect, Petitioner has conceded that the constitutional question was not raised until the case was before the Supreme Court of Pennsylvania. Certainly, arguments which may have been made by the Petitioner in the court below of any alleged inconsistency with "public policy" and "social requirements" do not involve federal constitutional questions.

Indeed, Petitioner's assertion that the alleged constitutional question was raised even before the Supreme Court of Pennsylvania is questionable. Petitioner's coverage of

the alleged constitutional question in the Supreme Court of Pennsylvania is limited to two sentences in a twenty page printed brief, these sentences being quoted in paragraph 3 of Petitioner's Reply to Answer to Petition for Reargument filed with the Supreme Court of Pennsylvania, as follows:

> "An adoption decree terminates the natural parent-child relationship, and engrafts the adopted child onto the family tree of the new parentage. As such, the child attains the status, in law, of a natural child. Cf., Schwab Adoption Case, 355 Pa. 534, 536, 50 A. 2d 504, 505 (1947). To (sic) certainly appear to be a deprivation of both equal rights as well as due process under the Constitution of the United States."

In raising the federal constitutional question below care must be taken to make reference to the particular clause of the federal constitution relied upon and this Court has held that reference to "due process of law" without further delineation does not sufficiently frame the federal question. *Bowe v. Scott*, 233 U. S. 655, 664-5 (1913). See also *Herndon v. Georgia*, 295 U. S. 441, 442-3 (1935); *Harding v. Illinois*, 196 U. S. 78, 88 (1904); *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 248 (1901).

## II.

### There Is No Constitutional Question Involved.

The Petition states that "petitioner finds herself on no family tree." (page 6). This is not correct. Even though she was sixty-six years old when she was adopted by this dying man, she was engrafted onto the family tree of her adopting parents. Her real complaint is that the Pennsylvania statutes prevented her from using this device

to inherit under a will and deed of trust of a third person who died over twenty-nine years before the adoption.

The transmission of property by will or intestacy is regulated and limited by state law as enacted by the state legislature and interpreted by the state courts. *Labrine v. Vincent*, 401 U. S. 532 (1971),[1] denying an illegimate the right to inherit; see also *U. S. v. Burnison*, 339 U. S. 87 (1950) denying the United States the right to a testamentary gift; *Irving Trust Co. v. Day*, 314 U. S. 556 (1942), sustaining the right of a widow to take against her husband's will; *Hood v. McGehee*, 237 U. S. 611 (1915), denying children adopted outside the state the right to inherit; *Mager v. Grima*, 8 How 490 (1850), sustaining tax on a testamentary gift to an alien. "Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction." *Irving Trust Co. v. Day*, 314 U. S. at 562.

Even assuming arguendo that this court may at some time desire to review the rights of adopted children under the federal Constitution, we respectfully submit that this case with its bizarre facts does not lend itself to such a review. The Pennsylvania Joint State Government Commission, drafters of the Wills Act of 1947, makes, *inter alia*, the following comment to Section 14(6) of the Wills Act of 1947, 20 P. S. Section 180.14(6); "In requiring adoptions to be made before the testator's death, it avoids the possibility of adoptions for the sole purpose of preventing a gift over in default of issue." It is submitted that in the case at bar the deathbed adoption of the Petitioner, a sixty-six year old "child", was for the sole purpose of changing the devolution of property.

---

1. Rehearing denied 402 U. S. 990.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

OTIS W. ERISMAN,
*Counsel for Frank F. Truscott, Dwight L. Morris and Otis W. Erisman, Trustees of the Estate of Harry D. Holloway, Deceased, Respondents.*

*Of Counsel:*
TRUSCOTT AND ERISMAN.

EDWARD M. DAVID,
*Counsel for Salome Holloway, Respondent.*

*Of Counsel:*
SAUL, EWING, REMICK AND SAUL.

March 14, 1972.

## CERTIFICATE OF SERVICE.

I hereby certify that on this 14th day of March, 1972 five copies of the Brief for Respondents in Opposition were delivered to S. Regen Ginsburg, Esq., Suite 1403, Land Title Building, Philadelphia, Pennsylvania, 19110, Attorney for Petitioner. I further certify that all parties required to be served have been served.

OTIS W. ERISMAN,
*Counsel for Frank E. Truscott, Dwight L. Morris and Otis W. Erisman, Trustees of the Estate of Harry D. Holloway, Deceased, Respondents.*

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